Issue: Administrative Review of Hearing Officer's Decision in Case No. 8882; Ruling Date: November 11, 2008; Ruling #2009-2128; Agency: Science Museum of Virginia; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Science Museum of Virginia
Ruling Number 2009-2128
November 6, 2008

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 8882. For the reasons set forth below, this matter will be remanded to the hearing officer for further clarification.

FACTS

In this case, the grievant received a Group III Written Notice with removal for, among other alleged offenses, an e-mail he sent on February 1, 2008. The alleged misconduct was described on the Written Notice as:

> For over a year, [Grievant] has exhibited inappropriate conduct and inappropriate interpersonal communication skills. In an effort to assist him in achieving improvement in these areas, he has been counseled both informally and formally by the SMV Director and Deputy Director on more than one occasion (formal conferences: 9/26/06 – Group II offense, 3/15/07, 3/29/07, 1/4/08, & 1/23/08). Please find record of [Grievant's] most recent offense in the attached email written by him to SMV's Deputy Director and copied to SMV's Director and several Board Members.[1]

In a decision dated August 25, 2008, the hearing officer rescinded the disciplinary action.[2] The hearing officer found that the grievant's e-mail was protected conduct under Va. Code § 2.2-3000 and the *Grievance Procedure Manual*.[3] The agency now seeks administrative review from this Department.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions …

[1] Decision of Hearing Officer, Case No. 8882, Aug. 25, 2008 ("Hearing Decision"), at 1.
[2] Hearing Decision at 7.
[3] *Id.* at 6-7. The hearing officer upheld his determinations in a Reconsideration Decision dated September 15, 2008. Reconsideration Decision of Hearing Officer, Case No. 8882-R, Sept. 15. 2008 ("Reconsideration Decision").

on all matters related to procedural compliance with the grievance procedure."[4] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[5]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[7] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[8] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[9] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. Further, the hearing decision must contain findings of fact on the material issues and the grounds in the record for those findings. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In its request for administrative review of the hearing decision, the agency asserts:

> 1) the finding that "the Agency did not place any restrictions on to whom Grievant could send emails" is not supported by the evidence, because the evidence includes an e-mail to the grievant from the Deputy Director requiring the grievant to allow the agency Director to interface with Board Members, a requirement purportedly not followed by the grievant when he sent his February 1 e-mail to Board Members;
>
> 2) the conclusion that the Grievant was terminated in retaliation for protected activity is not supported by the evidence, and fails to consider the "crucial fact" that the Deputy Director had testified that the grievant "was entitled to engage in" the activity of making reports "such as the ones contained in his e-mails, even if the reports were false;" and
>
> 3) the hearing decision focused almost solely on the February 1 e-mail and failed to consider adequately the other charges in the Written Notice referencing prior incidences of inappropriate conduct.

---

[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4.
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.

The hearing officer has already reconsidered the first assertion and this Department has no basis to disturb that determination.[10] The remaining assertions are addressed below.

Retaliation/Protected Activity

The agency disputes the hearing officer's determination that the e-mail was a protected activity and thus not subject to discipline. The hearing officer correctly states that under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management."[11] Further, this Department has interpreted this statutory language to provide that engaging in such conduct is protected activity for purposes of a claim of retaliation.[12]

This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness.[13] The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis.[14] Further, under analogous Title VII retaliation case law, it is important to note that:

> [a]lmost every form of 'opposition to an unlawful employment practice' [the "protected act" under Title VII] is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise the conduct would not be 'opposition.' If

[10] Reconsideration Decision at 1-2 (changing finding to "Although the Agency did not specifically prohibit Grievant from sending emails to Board Members, the Deputy Director instructed Grievant to comply with the protocol of having the Agency Director communicate with Board Members. Grievant interpreted this instruction as a "gag order.").

[11] Hearing Decision at 6.

[12] Consistent with the grievance statute's anti-retaliation provisions (Va. Code § 2.2-3004(A)(v)-(vi), this Department has held that only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *E.g.*, EDR Ruling No. 2008-1964, 2008-1970. Engaging in the conduct discussed in Va. Code § 2.2-3000 is a "right otherwise protected by law." *Id.*

[13] *Cf.* Equal Employment Opportunity Commission (EEOC) Compliance Manual, Section 8, "Retaliation," at 8-7, at http://www.eeoc.gov/policy/docs/retal.html (protected acts under Title VII must be "reasonable" for the anti-retaliation provisions to apply). While Title VII is not at issue in this case, its retaliation analysis is analogous to other "protected act" retaliation claims.

[14] The agency appears to argue that the grievant's e-mail was misconduct because it circumvented a "communication protocol" by communicating directly with the Board. Regardless of whether this conduct was actually charged on the Written Notice, the hearing officer found that the Board was part of agency management. Consequently, communication to the Board is conduct generally protected by Va. Code § 2.2-3000 ("employees shall be able to discuss freely, and without retaliation, their concerns with . . . management"). As such, an employee's failure to comply with an agency "communication protocol" barring complaints to management does not constitute "misconduct" and thus would not justify discipline, unless the employee's communication was somehow unlawful or otherwise exceeded the limits of reasonableness.

> discharge or other disciplinary sanctions may be imposed simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected.[15]

The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

In its request for administrative review, the agency asserts that the grievant's February 1 e-mail threatened harm to people and property and, therefore, was not protected activity. On the other hand, in finding that the e-mail was protected activity, the hearing decision could be read as implicitly finding that the e-mail did *not* threaten harm to people or property. However, because the hearing decision included no discussion on the material issue of whether the e-mail contained a threat of harm to persons or property, or was otherwise unreasonable and unprotected**,** the hearing officer must address the parties' arguments and record evidence on that issue.

Accordingly, the decision is remanded to the hearing officer for further clarification and consideration. This ruling is not meant to indicate that the e-mail was or was not properly subject to discipline, only that the material issues and related arguments raised by the agency must be considered and addressed in the hearing decision.[16]

"Crucial" Fact

The agency alleges that the hearing officer failed to include consideration of the Deputy Director's testimony that the grievant "was entitled to make reports, such as the ones contained in his e-mail, even if the reports were false."[17] The agency claims this is a "crucial" fact and if the fact is true, it proves the agency's termination of the grievant was not in retaliation for his having engaged in protected activity.

That analysis is puzzling: the Deputy Director's statement, after the fact, that an employee would be "entitled" to make reports such as those in his February 1 e-mail, would appear to contradict the Written Notice's characterization of the grievant's act of e-mailing the Board as the "most recent offense."[18] It would also appear to contradict the agency's concurrent assertion that the Deputy Director required the grievant to allow the agency Director to interface with Board Members, a requirement purportedly not followed by the Grievant when he sent his February 1 e-mail to Board Members. Nevertheless, because the matter is being remanded, the hearing officer will have the discretion to consider the agency's argument and include discussion of this point in a reconsideration decision should he see fit to do so.

---

[15] Dea v. Wash. Suburban Sanitary Comm'n, 11 F. App'x 352, 363 (4th Cir. 2001) (quoting EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983)).

[16] In considering on remand whether the e-mail was protected activity under Va. Code § 2.2-3000 and § 2.2-3004(A)(v)-(vi), the hearing officer could additionally consider whether the e-mail was protected conduct as a report of fraud or gross mismanagement. *See also Grievance Procedure Manual* § 4.1(b)(4).

[17] This language is quoted from the agency's request for administrative review and is not meant to indicate a quote of hearing testimony.

[18] See also testimony of the Deputy Director describing the behavior being disciplined, upon questioning by the hearing officer, as sending out communications based on "falsehoods" to the Board and describing this e-mail as the final "straw". Hearing Recording at 1:07:00 – 1:10:20.

Prior Incidents

The agency also appears to argue that the hearing officer erred by focusing only on the e-mail and not discussing other alleged prior incidents referenced in the Written Notice for which the agency states it was also disciplining the grievant. Because the language of the Written Notice references other prior acts, which are not addressed in the decision, the hearing officer is directed to consider the agency's evidence of those acts. These alleged acts may or may not have any effect on the outcome of the hearing decision, and indeed, may only require brief consideration.[19] Nevertheless, the hearing officer is directed to address the agency's arguments on this point upon remand.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

As set forth above, this matter is remanded to the hearing officer for further clarification and consideration. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new* matter raised in the reconsideration decision (i.e., any matters not previously part of the original decision).[20] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[21]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[22] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24]

_____

Claudia T. Farr
Director

[19] In this Department's review of the record, there appeared to be little specific evidence of such prior acts presented at hearing. We also note that DHRM has stated in the past that an agency cannot aggregate lesser level offenses to become a single higher-level offense. *E.g.*, DHRM Policy Ruling, Case No. 8233, Dec. 1, 2006 ("Policy No. 1.60 permits for an accumulation of written notices that may result in disciplinary actions such as transfer, demotion, suspension, etc., but offers no support for combining violations in order to issue a higher level of discipline.").
[20] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[21] *See Grievance Procedure Manual* § 7.2(a).
[22] *Grievance Procedure Manual* § 7.2(d).
[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[24] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).